Supreme Court, U. S.
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80-515

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

W. C. YORK,

Petitioner,

v.

FEDERAL HOME LOAN BANK BOARD and FEDERAL SAVINGS AND LOAN INSURANCE CORP.,

Respondents,

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF RALEIGH,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

1. Whether the depositors in a Federal mutual savings and loan association are owners of that association with property rights protected by the Constitution?

2. Whether the conversion of First Federal Savings and Loan Association of Raleigh, Raleigh, North Carolina from mutual to capital stock form deprived the plaintiff and its depositors of their property rights without just compensation, and its approval by the Federal Home Loan Bank Board ("Bank Board") and Federal Savings and Loan Insurance Corporation ("FSLIC") by regulations (12 C.F.R. §563b.1 *et seq.*) under the purported authority of the Home Owners' Loan Act of 1933 (HOLA) (12 U.S.C. §1464(j)) was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law and should be set aside?

3. Whether the United States Court of Appeals for the Fourth Circuit erred in affirming the Federal Home Loan Bank Board's approval of the conversion of First Federal Savings and Loan Association from mutual to capital stock form?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

OPINION BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS AND REGULATIONS INVOLVED... 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT:

I. The legitimacy of mutual-type institutions, which the Fourth Circuit's decision challenges, is a matter of great public interest with far reaching economic and social consequences 3

II. The action of the Federal Home Loan Bank Board, affirmed by the Fourth Circuit, has denied property and other ownership rights of the depositors of a federal mutual savings and loan association clearly recognized by other Courts of Appeals.... 5

CONCLUSION 17

APPENDIX—Opinion of the Court of Appeals..... 1a

TABLE OF AUTHORITIES

Cases:

Broadview Savings and Loan Ass'n. v. *Peck,* 133 N.E. 2d 366, 165 Ohio St. 82 (1956) 9

Chickasaw Federal Savings & Loan Ass'n. v. *Oklahoma Tax. Com'n., Okl.,* 528 P. 2d 1384, (1974)...11, 13, 14

Hamblett v. *Board of Savings and Loan Associations,* 472 F. Supp. 158 (D.N.D. Miss. 1979) 12

Hendrickson v. *Buchbinder,* 465 F. Supp. 1250 (D.S.D. Fla. 1979) 12

PRECEDING PAGE WAS BLANK

Kupiec v. *Republic Federal Savings & Loan Ass'n.*, 512 F. 2d 147 (7th Cir. 1975) 8, 10, 13

Lanigan v. *Apollo Savings*, 353 N.E. 2d 239, 40 Ill. App. 3d 927 (1976) 11, 12

Nebraska League of Savings Associations v. *Mathes*, 266 N.W. 2d 720, 201 Neb. 122 (1978)..... 10, 11

Second Federal Savings and Loan Ass'n. of Cleveland v. *Bowers*, 151 N.E. 2d 223, 168 Ohio St. 65 (1958).. 9

Society for Savings v. *Bowers*, 349 U.S. 143, 75 S. Ct. 607, 99 L. Ed. 950 (1955)..... 9, 10

Techerepnin v. *Knight*, 389 U.S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967) 11, 13

Vernon Savings & Loan Ass'n., Okl., 580 P. 2d 518 (1978) 11

West Side Federal Savings and Loan Ass'n. of Fairview Park v. *United States* 494 F. 2d 404 (6th Cir. 1974) 7, 8, 10, 13

Wisconsin Bankers Ass'n. v. *Mutual Savings & Loan Ass'n.*, 275 N.W. 2d 130, 87 Wis. 2d 470 (1979)... 14

Statutes:

U.S. Const. amend. V. 5, 17
Pub. L. 96-221, 94 Stat. 132 (1980) 14
Pub. L. 89-597, 80 Stat. 823 (1966) 12
Pub. L. 90-448, 82 Stat. 476 13
12 U.S.C. Sec. 1437 6
12 U.S.C. Sec. 1464 ..... i, 2, 6, 13
12 U.S.C. Sec. 1724 6
12 U.S.C. Sec. 1725 ..... 3, 6
12 U.S.C. Sec. 1730 6
15 U.S.C. Sec. 78 11

Regulations and Other Authorities:

12 C.F.R. Sec. 544.1 ..... 2, 15
12 C.F.R. Sec. 545.1-2 ..... 2, 15
12 C.F.R. Sec. 563b.3 ..... i, 2, 15, 16

Savings and Loan Fact Book '80, United States League of Savings Associations 4

Life Insurance Factbooks 1979, American Council of Life Insurance 4

Combined Financial Statements—1979, Federal Home Loan Bank Board 5

Proxy Statement, First Federal Savings and Loan Association of Raleigh, May 29, 1979 16

Legislative Documents:

House Report No. 1585, June 25, 1968, to accompany H.R. 17989 13

Congressional Record, July 10, 1968 13

Conference Committee Report No. 96-640, to accompany H.R. 4986, March 21, 1980 14

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FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF RALEIGH,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner W. C. York respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit affirming the Federal Home Loan Bank Board's approval of the conversion of First Federal Savings and Loan Association of Raleigh, Raleigh, North Carolina, from mutual to capital stock form, entered in this proceeding on July 1, 1980.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 1, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Statutory Provisions and Regulations Involved

The pertinent sections of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §1464 *et seq.* (Section 1725(j)), and the Federal Home Loan Bank Board's Regulations (12 C.F.R. Sections 544, 545 and 563b.1 *et seq.*)

Statement of the Case

This proceeding arises from a petition for review of an action by the Federal Home Loan Bank Board, acting as the operating head of the Federal Savings and Loan Insurance Corporation, which purported to approve the proposed conversion of First Federal Savings and Loan Association of Raleigh ("First Federal") from the mutual form of ownership to the stock form of ownership while retaining its federal charter.

First Federal's application for permission to carry out the proposed conversion was originally filed on October 17, 1978; and on May 17, 1979, the Bank Board rejected written objections by the petitioner and other members of First Federal and purported to approve the proposed conversion by its resolution number 79-298.

On June 19, 1979, the petitioner instituted a civil action in the United States District Court for the Eastern District of North Carolina (W. C. York v. First Federal Savings & Loan Association of Raleigh, et al., No. 79-354-CIV-5). The petitioner sought a judgment declaring that the proposed conver-

sion was unlawful and ultra vires and enjoining the defendants[1] from proceeding with the conversion on the grounds, among others, that the statutory authority for such conversions expired on June 30, 1976; that the purported approval of the proposed conversion by the Bank Board was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law, and that the proposed plan of conversion was adopted by First Federal's Board of Directors in violation of their fiduciary obligations because the proposed conversion would unfairly deprive many members of First Federal of their property and voting rights therein without just compensation while resulting in a windfall to certain other members including the directors.

On June 27, 1979, the petitioner instituted a proceeding in the United States Court of Appeals for the Fourth Circuit, pursuant to provisions of 12 U.S.C. §1725(j), expressly stating that he believed the District Court and the civil action referred to above were the proper forum for the adjudication of his challenge to the Bank Board's resolution since §1725(j) had apparently expired and that the petition for review was filed solely to preserve his right to review of that order should it be determined that, contrary to his belief, jurisdiction was properly in the Circuit Court. On August 27, 1979, the Court of Appeals granted First Federal's motion to intervene in this action. On July 1, 1980, the Court of Appeals issued its decision that petitioner's claims were without merit, and the Bank Board's position was affirmed.

REASONS FOR GRANTING THE WRIT

I. The legitimacy of mutual-type institutions, which the Fourth Circuit's decision challenges, is a matter of great public interest with far reaching economic and social consequences

Mutually organized institutions are a major factor in the

[1] The defendants in that action were First Federal, its directors, the Bank Board and its members and the FSLIC.

United States economy, and directly and indirectly touch the daily life of almost every citizen. Such institutions include mutual savings and loan associations, mutual savings banks, mutual life insurance companies, credit unions and cooperatives (primarily farmer cooperatives). Collectively, mutual-type institutions control or manage over *$1 trillion* in assets.

($ Figures in Billions, as of December 31, 1979)

	Assets
Mutual Savings and Loan Associations	$438
Mutual Savings Banks	$163
Mutual Life Insurance Companies	$345 (est.)
Credit Unions	$ 66
Cooperatives	$ 20 (est.)
	$1,032 billion

(Sources: Savings and Loan Fact Book '80, United States League of Savings Associations; Life Insurance Factbook 1979, American Council of Life Insurance.)

As is shown in the following discussion, mutual-type institutions have been traditionally held to be owned by their depositors or customers. By definition, they have no other owners.

A result upholding the decision of the Fourth Circuit in this case could have the effect of throwing the status of the ownership of most or all mutual-type institutions into doubt. Such a result would be highly disruptive to a significant segment of the economy, which has traditionally been recognized by Congress to have a special and favored place, reflected by tax and other benefits relative to stockholder-owned, profit-making corporations.

Even if such a result supporting the Fourth Circuit could be restricted to the savings and loan industry, the results would be sweeping. There are approximately 2,322 mutual savings and loan associations with assets totalling some $430 billion dollars.

Throughout the country, Americans hold approximately 67 million accounts in such mutual associations. Collectively, these mutual savings and loan associations have a net worth of some $24 billion. If the Fourth Circuit's decision stands, the road will be open to an unrestricted transfer of ownership of that $24 billion in net worth, and control of that $430 billion in assets, from tens of millions of depositor-members of mutual associations to a small number of stockholder-investors, without just compensation.

> (Combined Financial Statements—1979, Federal Home Loan Bank Board at 7-8; Savings and Loan Fact Book '80, United States Savings and Loan League, at 63.)

It is argued in the following discussion that the depositor-members of mutual savings and loan associations do have property rights in their association (i.e., are owners of its net worth); that they have not been able to fully realize this ownership interest since the imposition of interest rate controls in 1966; that a change of terminology of accounts in 1968 from "share" to "deposit" accounts did not diminish their ownership interest; that now that interest rate controls are being lifted by Congress they can once again realize this interest; that the conversion of a Federal mutual savings and loan association from mutual to capital stock form takes this interest without just compensation; that approval of such a conversion by the Federal Home Loan Bank Board is in violation of the Fifth Amendment of the Constitution and the depositors contract rights; and that the Fourth Circuit's affirmation of the Bank Board's approval should be reversed.

II. The action of the Federal Home Loan Bank Board, affirmed by the Fourth Circuit, has denied property and other ownership rights of the depositors of a federal mutual savings and loan association clearly recognized by other Courts of Appeals.

First Federal is an operating mutual savings and loan association which was originally chartered by the federal government

in 1937. The respondent Federal Home Loan Bank Board is an independent agency in the executive branch of the United States government (12 U.S.C. §1437(b)) and is responsible, among other things, for the chartering, organization, supervision and regulation of federal savings and loan associations, including First Federal. Section 5(a) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §1464(a) authorizes the Bank Board to issue charters to Federal savings and loan associations.

> "(G)iving primary consideration to the best practices of local *mutual* thrift and home-financing institutions in the United States." (emphasis added)

The Federal Savings and Loan Insurance Corporation is a corporate instrumentality of the United States government which is under the direction and control of the Bank Board. 12 U.S.C. §§1437(b), 1725(a) and (c) and 1730(b)(1). It insures the accounts of all federal associations and eligible state chartered associations; and it regulates all such insured institutions. Title IV of the National Housing Act, as amended, (NHA), 12 U.S.C. §1724 *et seq.* The Bank Board and the FSLIC are jointly referred to in this petition as the Bank Board or the respondents.

The decision of the Fourth Circuit raises questions about the very nature of a mutual savings and loan association. That question has been considered by other Circuits, with opposite results. According to the Fourth Circuit's decision:

> Although the depositors are the legal "owners" of a mutual savings and loan association, their interest is essentially that of creditors of the association and only secondarily as equity owners . . . They are not allowed to realize or share in profits of the association, but are entitled only to an established rate of interest . . . their only opportunity to realize a gain of any kind would be in the event the savings and loan association dissolved or liquidated . . . Thus, it is apparent that depositors will not be deprived of property rights by conversion to a federal stock association.

> Depositors only real rights, their rights as creditors of the association, will remain unchanged by the conversion.

This description severely diminishes what have traditionally been held to be the rights of the depositors of a mutual savings and loan association. The Court of Appeals for the Sixth Circuit, in discussing the position of the depositors in a Federal savings and loan association in *West Side Federal Savings and Loan Ass'n. of Fairview Park* v. *United States,* 494 F. 2d 404 (6th Cir. 1974) at 409-11, a case involving the taxation of the merger of mutual savings and loan associations, said:

> All (depositors) have a dual relationship to the association, being in the position of creditors as holders of savings accounts and as members, possessing certain proprietary rights, including the right to vote, the right to share the association's earnings and in its assets upon liquidation. While admitting that whatever equity exists in a federal savings and loan association resides in its depositors and borrowers, the government maintains that each depositor's equity or proprietary interest is minimal compared to his rights as a creditor.
>
> . . . .
>
> The court specifically refused to adopt the argument of the government, made also in this case, that since a depositor in a savings and loan association is a creditor for some purposes he must be considered a creditor of the association for all purposes. (citations omitted)
>
> . . . .
>
> It contends, finally, that no additional value adheres to a savings account in a federal savings and loan association because of the incidental proprietary rights which go along with membership. Thus, it is said, in reality, a withdrawable savings share account is nothing more than the equivalent of a demand deposit in a bank account.
>
> . . . .
>
> (S)ince a savings account is the only proprietary interest available in a federal mutual savings and loan association

> . . . it is improper to ignore the proprietary rights included in what they received and concentrate only on their rights as creditors.
>
> . . . .
>
> We find that each owner of a proprietary interest in Parma (savings and loan association) acquired a proprietary interest in West Side (savings and loan association) which is definite and material and it represented a substantial part of the value of the stock that was given up . . .

On the subject of members rights, the Court of Appeals for the Seventh Circuit, in *Kupiec* v. *Republic Federal Savings & Loan Ass'n.*, 512 F. 2d 147, 152-4 (7th Cir. 1975), a case affirming the rights of members to inspect the association's membership list for the purpose of communicating with other members, after noting that members have the right to vote, to call special meetings, to elect directors, to a report on the association's financial condition, and to amend, alter or repeal the association's charter, said:

> As the courts in *Murphy, Ochs* and *Durnin* recognized, the rights of the associations members are analogous to those of a corporate shareholder (footnote omitted), and in order for these rights to be more than idle gestures, association members, like corporate shareholders, must have some means of communicating with one another.
>
> . . . .
>
> As indicated earlier, we agree that the rights of the federal savings and loan association members are analogous to the rights of the corporate shareholder.

Thus, it is apparent that there is a substantial difference of opinion between Circuits as to what the rights of a member of a federal mutual savings and loan association are. It is believed that the Fourth Circuit's decision is the first Court of Appeals decision holding that members have no significant rights other than those of creditors. If this decision stands, it will mark a substantial departure from previous law.

The Fourth Circuit's reliance on Society for Savings v. *Bowers (349 U.S. 143 (1955)) for its holding that members' rights are insignificant is misplaced.*

The only case cited by the Fourth Circuit as support for its decision disregarding members' rights was *Bowers, supra.* If this is not a good reading of *Bowers,* the rationale and the conclusion should fall.

The issue in *Bowers* was whether an Ohio state tax law which applied to mutual savings banks and mutual savings and loan associations was a tax on the association *per se* or on the ownership interests of its members. This Court held that the tax was on the association, and thus was invalid as a state tax on federal securities, some of which were held by the association. The General Assembly of Ohio then rewrote the law to explicitly tax the "ownership interests of the depositors." This revised law was then applied and upheld, *Broadview Savings and Loan Ass'n.* v. *Peck,* 133 N.E. 2d 366, 368, 165 Ohio St. 82 (1956); *Second Federal Savings and Loan Ass'n. of Cleveland* v. *Bowers,* 151 N.E. 2d 223, 225, 168 Ohio St. 65 (1958).

This Court, in dicta in *Bowers,* noted:

> "The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily, a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest. If he continues, his only chance of getting anything more would be in the unlikely event of a solvent liquidation, a possibility that hardly rises to the level of an expectancy. It stretches the imagination very far to attribute any real value to such a remote contingency, and when coupled with the fact that it represents nothing which the depositor can readily transfer, any theoretical value reduces almost to the vanishing point.

This Court's discussion, *supra,* notes both that depositors have an "intangible ownership interest," and that they may share in the association's surplus by way of interest paid on their deposits. It was precisely this "ownership interest" that was successfully taxed by the revised Ohio tax law, which taxed the association's surplus as the property of the depositors. The discussion in *Bowers* says only that a solvent liquidation of the association (or savings bank) is unlikely. That question is not here under consideration. What is under consideration is the ownership rights of the members, and their right to share in the association's surplus by way of dividends or interest, both of which *Bowers* affirms. Thus, *Bowers* cannot be correctly cited as authority to extinguish the ownership rights of the depositors in a Federal mutual savings and loan association.

It is well settled that mutual savings and loan associations are owned by their depositors.

In addidtion to *West Side Federal* and *Kupiec,* other recent cases indicate the ownership rights of depositors in mutual savings and loan associations. The Supreme Court of Nebraska, in *Nebraska League of Savings Associations* v. *Mathes,* 266 N.W. 2d 720, 721-4, 201 Neb. 122 (1978), which held that the State of Nebraska could not make deposits in Federal mutual savings and loan associations because the Nebraska Constitution prohibited the purchase by the State of "stock," stated:

> A deposit in a mutual savings and loan association creates interests distinctly different than the interests created by a deposit in a bank. A depositor in a bank becomes a creditor of the bank . . . A deposit in a mutual savings and loan association, on the other hand, constitutes the acquisition of an ownership interest and a right to share in the control and the profits or losses on liquidation of the mutual savings and loan association.
>
> . . . .
>
> A multitude of cases hold that the owner of an account in a mutual savings and loan association has a proprietary

> interest therein. (Citing *Tcherepnin* v. *Knight*, 389 U.S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564; *Wisconsin Bankers Ass'n.* v. *Robertson*, 190 F. Supp. 90, 111 U.S. App. D.C. 85, 294 F. 2d 714, cert. den., 368 U.S. 938, 82 S. Ct. 338, 7 L. Ed. 2d 338 and *Family Savings and Loan Ass'n.* v. *Steward*, 232 Md. 424, 194 A. 2d 118).
>
> . . . .
>
> The shareholders have the same rights as stockholders in ordinary corporations for profit . . . In other words, the members or shareholders own the association and are entitled to conduct its affairs through their officers and Board of Directors.

Other decisions to the same effect are *Matter of Vernon Savings and Loans Ass'n., Okl.*, 580 P. 2d 518, 522 (1978); *Lanigan* v. *Apollo Savings*, 353 N.E. 2d 239, 242-3, 40 Ill. App. 3d 927 (1976); *Chickasaw Federal Savings & Loan Ass'n.* v. *Oklahoma Tax Com'n., Okl.*, 528 P. 2d 1384, 1389 (1974).

Traditionally, mutual savings and loan associations paid their depositors dividends out of earnings, rather than interest on deposits.

In *Tcherepnin* v. *Knight*, 389 U.S. 332, 337, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967), this Court held that a withdrawable capital share in a state-chartered mutual savings and loan association was a "security" within the meaning of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. §78a *et seq.* In its discussion, this Court said:

> City Savings' (the association in question) capital is represented exclusively by withdrawable capital shares. Each holder of a withdrawable capital share becomes a member of the association (citation omitted) and is entitled to "the vote of one share for each one hundred dollars . . . The holders of withdrawable capital shares are not entitled to a fixed rate of return. Rather, they receive dividends declared by an association's board of directors and based on the association's profits.

See also, Hamblett v. *Board of Savings and Loan Associations,* 472 F. Supp. 158 (D.S.D. Miss. 1979); *Hendrickson* v. *Buchbinder,* 465 F. Supp. 1250 (D.S.D. Fla. 1979). In fact, in 1976, the FSLIC argued the opposite of its present position as presented to the Fourth Circuit in the instant case in *Lanigan* v. *Apollo Savings,* 353 N.E. 2d 239, 242-3, 40 Ill. App. 3d 927 (1976), a case dealing with the post-liquidation distribution of an insolvent mutual savings and loan association's assets. As stated in the court's decision:

> (FSLIC) points out that the fundamental difference between a savings and loan depositor and a bank depositor is that the latter receives a pre-determined interest rate on his account, while the former by contractual agreement receives a dividend dependent upon the profitability of the the savings and loan association.

The court then went on to note that although the depositors may not have fully understood their rights, "ignorance on the part of the depositors would not be grounds for altering the fundamental relationship between Apollo and its account holders."

Payment of mutual savings and loan association earnings to depositors was temporarily restricted by federal rate-control legislation in 1966.

Prior to the granting of temporary discretionary rate control authority to the Federal Home Loan Bank Board by Congress in 1966 (Pub. L. No. 89-597, 80 Stat. 823 (1966)), there was no direct governmental regulation of the dividends mutual S&L's could pay to their shareholders. The law extending rate controls to S&L's was "emergency" legislation, and was supposed to expire in one year (§7). Presumably, had the controls expired as originally scheduled, the situation would have reverted to the pre-1966 status quo, and savings and loan's would once again have been free to pay dividends set solely based on earnings. The "one-year" rate controls were extended numerous times until 1980.

The terminology of accounts in mutual savings and loan associations was changed in 1968, but the substance of the relationship between the institution and the depositor was left unchanged.

In 1968, Congress passed an extensive piece of legislation, the Housing and Urban Development Act of 1968, Pub. L. 90-448; 82 Stat. 476. Title XVII of this Act, §1716, amended Section 5(b) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464 (b)) to do a number of things, including permitting Federal mutual savings and loan associations to change the terminology of their accounts from "shares" to "savings accounts" and to accept "time deposits." It has been argued by the Bank Board that this name change reduced the depositors status from that of members to mere creditors. (*Tcherepnin, West Side Federal* and *Kupiec,* all post-1968 cases notwithstanding). This is refuted by both the House Report and House debate on that section of the Bill which accompanied its passage.

House Report No. 1585, June 25, 1968 (to accompany H.R. 17989), in its discussion of this section, noted that it "does not represent any radical innovations in our financial system" but was merely "in keeping with today's savings habits . . ." (at 2984).

When the precise question of this change was raised on the floor of the House, a supporter of the Bill responded, "All the Amendment would do is put everybody in the same position. We are not changing the legal position of the parties with mutuals or shares (Cong. Rec., July 10, 1968, at 20539). In response to the question, "What is the commensurate responsibility of the savings and loans as between share and deposit accounts?" the answer was given, ". . . in terminology and in the very thinking of the man involved . . . there is no difference" (at 20541).

This precise question was addressed by the Supreme Court of Oklahoma in 1974 in *Chickashaw Federal Savings and Loan tions,* 472 F. Supp. 158 (D.N.D. Miss. 1979); *Hendrickson* v. *Ass'n.* v. *Oklahoma Tax Commission, Okl.,* 528 P. 2d 1384, 1386 *et seq.* a case which decided that there was no significant difference between "dividends" on "share accounts" and "interest" on "savings deposits" for purposes of taxation. Both were

treated as a distribution of earnings. The court noted that holders of savings deposits and share accounts in "deposit associations" have equal voting and other membership rights and are entitled to equal priority upon dissolution or liquidation. The court held that "the only reasonable construction" was that "payments by appellee deposit associations to holders of savings deposits and share accounts constitute payments of a 'dividend or distribution of earnings . . .' " *See also, Wisconsin Bankers Ass'n.* v. *Mutual Savings and Loan Ass'n.*, 275 N.W. 2d 130, 140, 87 Wis. 2d 470 (1979).

Interest rate controls have now been eliminated, or are being "phased-out" by act of Congress.

In March, 1980, Congress passed the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, 94 Stat. 132. Section 202(a) of the Bill, entitled "Findings and Purpose" states:

> "It is the purpose of this title to provide for the orderly phase-out and the ultimate elimination of the limitations on the maximum rates of interest and dividends which may be paid on deposits and accounts by depository institutions . . ."

This objective is accomplished by §207(a), under which a Deregulation Committee is created to phase-out such rate controls over, at a maximum, a period of six years. The Senate Conference accompanying the Bill (Report No. 96-640, to accompany H.R. 4986, March 21, 1980), states, "During the six year period, the committee is directed to provide for a phase out of Regulation Q (rate controls) just as soon as possible . . ."

Thus, Congress has, by statute, terminated interest rate controls, and provided a mechanism for their phase-out "as soon as possible." Such controls on maximum rates, and on the interest rate differential between commercial and thrift institutions, have not yet been phased-out, but this law, at a minimum, creates a reasonable expectation that this will be the case within, at most, six years, and quite possibly sooner.

With the phase-out of interest rate controls, Federal mutual savings and loan associations may return to the practice of paying "dividends" or "interest" based solely on earnings, and the depositors in such associations have a right to such payments, which may exceed what would have been allowable under rate control.

Under the Bank Board's present regulations, the only reason a Federal mutual savings and loan association may retain earnings is for the purpose of meeting losses. 12 C.F.R. §544.1 (Charter N, 10). The regulations further provide that "in lieu of or in addition to such net earnings, any of the association's surplus funds may likewise be distributed." Sections 545.1-2(b) and (c) create an identity of interests and rights between holders of "deposits" and holders of "accounts."

Presently, these regulations must operate within the limits set by rate controls. However, with the lifting of maximum rate regulations, a Federal mutual savings and loan may set interest rates to reflect both earnings, and, if the directors so decide, the distribution of surplus above that required for reserves. In many cases, such additional surplus has been retained due to rate controls. Since there is no other authorization for surplus other than for necessary loss reserves, the remaining surplus belongs to, and should be paid to, the Federal mutual savings and loan associations' depositors, as "interest" or "dividends" on their "share" or "savings" or "deposit" accounts.

The conversion of a Federal mutual savings and loan association to capital stock form will permanently and completely eliminate the rights of the vast majority of the (previously) mutual association's members to share in this surplus and in any future earnings, to which they would have been entitled beyond a minimum guaranteed interest rate.

Under the Bank Board's conversion regulations, all of the ownership rights of converted associations, including First Federal of Raleigh, pass to the new stockholders. 12 C.F.R. §563b.3 (c)(8), and the depositors become creditors and nothing more.

Only those members of the mutual who buy stock in their converting association retain their property and ownership interests. This typically represents less than 4% of the mutual's members. *See* Report of the Federal Home Loan Bank Board to the Congress of the United States of America on Mutual to Stock Conversions of Savings and Loan Associations, April 15, 1978 at 16, noting that in a sample of twenty completed conversions only 3.8% of the account holders purchased stock in the converting association. The remaining 96% lost all of their ownership rights.

In return for their interest in the association, the non-stock purchasing members are "compensated" with a so-called "liquidation account." 12 C.F.R. §563b.3(f), to be maintained on the books of the association in the amount of the association's net worth on conversion, to be distributed to any pre-conversion members who have maintained their accounts without withdrawal in the event of the liquidation of the association. Earnings and other benefits accruing from the funds represented by the "liquidation account" flow to the new stockholders, as does the account itself, as old depositors withdraw from, or close, their pre-conversion accounts. This "interest" in the "liquidation account" is the sole compensation to the vast majority of pre-conversion depositors who do not buy stock, in return for passing their entire ownership interest, both voting and property rights, to the new stockholders.

Immediately prior to its conversion, First Federal of Raleigh Savings and Loan Association of Raleigh had a net worth of $13,777,272 belonging to its depositors, who were represented by approximately 34,000 savings accounts. The *pro rata* ownership of this net worth would depend on the size of each account, but by way of example, distributed evenly, this would represent an average interest of $405 per account. Following conversion to stock form, this interest ceased to exist. (Proxy Statement, First Federal Savings and Loan Association of Raleigh, May 29, 1979 at 2, 62.)

Approval by the Bank Board of the conversion of First Federal of Raleigh, in which the property rights of the mutual's de-

positors were taken without just compensation, was arbitrary, capricious, and abuse of discretion, and should be set aside.

The taking of property which occurred at First Federal of Raleigh, and is continuing to occur in other such conversions, is a clear violation of the rights of depositors in Federal mutual savings and loan associations under the Fifth Amendment to the constitution.

Since it violates basic Constitutional rights, the approval by the Bank Board of the conversion from mutual to stock form of First Federal Savings & Loan Association of Raleigh is arbitrary, capricious and an abuse of discretion, and otherwise not in accordance with law, and should be set aside, and the affirmation of this Bank Board action by the Court of Appeals for the Fourth Circuit is in error, for the reasons cited above, and should be reversed.

The Fourth Circuit, suggested in a footnote in its opinion (footnote 8, at 11), that these are "policy arguments" and are "more suitably addressed to a legislative body." The question of the taking of property rights under the Fifth Amendment to the Constitution is most emphatically not a policy question for Congress, but precisely the kind of question which it is the special province of this Court to decide.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Fourth Circuit.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1382

W. C. YORK,

Petitioner,

versus

FEDERAL HOME LOAN BANK BOARD and FEDERAL SAVINGS AND LOAN INSURANCE CORP.,

Respondents,

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF RALEIGH,

Intervenor,

NATIONAL SAVINGS AND LOAN LEAGUE,

Amicus Curiae,

NORTH CAROLINA SAVINGS AND LOAN LEAGUE,

Amicus Curiae.

Upon Petition for Review of an Action of the Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation.

Argued: May 8, 1980 Decided: July 1, 1980

Before FIELD, Senior Circuit Judge, and HALL and PHILLIPS, Circuit Judges.

Howard E. Manning and Michael T. Medford (Manning, Fulton and Skinner on brief) for Petitioner; Michael L. Seabolt, Harvey Simon (Harold B. Shore, Office of General Counsel, Federal Home Loan Bank Board on brief) for Respondents; Arch E. Lynch, Jr. (John J. Geraghty, Cecil W. Harrison, Jr., Poyner, Geraghty, Hartsfield & Townsend on brief) for Intervenor First Federal Savings and Loan Association of Raleigh; (Harding deC. Williams, General Counsel on brief) for Amicus Curiae National Savings and Loan League; (L. P. McLendon, Jr., Brooks, Pierce, McLendon, Humphrey and Leonard; Daniel J. Goldberg, Silver, Freedman, Housely, Taff and Goldberg on Brief) for Amicus Curiae North Carolina Savings and Loan League.

FIELD, Senior Circuit Judge:

On October 17, 1978, the First Federal Savings & Loan Association of Raleigh (hereinafter First Federal) filed an application with the Federal Home Loan Bank Board (hereinafter FHLBB or Bank Board) seeking to convert from a mutual form of ownership to a stock form of ownership while retaining its federal charter.[1] On May 17, 1979, the FHLBB approved the proposed conversion over the objections of petitioner and several other First Federal depositors. The approved plan was presented to the member/depositors of First Federal at a special meeting on June 29, 1979, and was overwhelmingly approved. Shortly thereafter, petitioner instituted a civil action in the United States District Court for the Eastern District of North Carolina, and filed a petition in this court for review of the agency determination.[2]

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[1] A mutual savings and loan association is "owned " by its depositors and the right of control is based upon the amount deposited by a member in his account. In practice, a depositor signs a proxy form when first opening an account which allows the officers of the association to cast the depositor's votes as they see fit. Conversion to a stock corporation would transfer ownership and right of control to shareholders purchasing stock in the assocation.

[2] This Court has exclusive jurisdiction to consider challenges to FHLBB actions under 402(j)(4) of the National Housing Act, 12 U.S.C. §1725(j)(4) and 12 U.S.C. §1730a(k).

Petitioner contends that the proposed conversion was unlawful since the statutory section authorizing conversions from mutual to stock organizations, 402(j) of the National Housing Act (NHA), expired on June 30, 1976, or in the alternative, that the Bank Board's decision to allow this conversion was arbitrary and capricious. We find these objections to be without merit and, accordingly, affirm the FHLBB.

In 1933, Congress enacted the Home Owners' Loan Act[3] which authorized the creation of federally chartered mutual savings and loan associations and also allowed previously chartered state associations to convert to federal associations. At the time the Act was passed, almost all savings and loans were organized as mutual associations; therefore, Congress adopted this form of organization for the federal system of savings and loans.

Shortly thereafter, states began passing legislation allowing state chartered mutual associations to convert to state stock associations. Conversions were perceived as necessary by many associations to raise additional capital. In 1948, Congress passed legislation allowing federal mutual savings and loans to convert to *state* stock associations. Federal mutuals converting pursuant to this amendment to 5(i) of the Home Owners' Loan Act lost their federal charters. In the ensuing years, the large number of federal mutuals converting to state stock associations resulted in an adverse impact on the federal system.

To stop the erosion of the federal system, the FHLBB imposed an administrative moratorium on federal to state conversions. Then in 1973, Congress added 402(j) of the National Housing Act[4] which gave the Bank Board authority to approve

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[3] 12 U.S.C. § 1461, *et seq.*

[4] Section 402(j) of the NHA, 12 U.S.C. §1725(j), provides in pertinent part:

(j)(1) Except as otherwise provided in this subsection, until June 30, 1976, the Corporation shall not approve, under regula-

(Footnote continued on following page)

conversions of federal mutual to *federal* stock associations. Section 402(j)(1), however, placed a temporary moratorium on the exercise of conversion authority to give the FHLBB time to revise and promulgate regulations governing all conversions. The final conversion statute, Public Law 93-495, enacted in 1974, continued the existing moratorium on all conversions until June 30, 1976, with the exception of fifty-one test cases. Petitioner contends that §402(j)(3), which gave the FHLBB power to grant conversions, also terminated on June 30, 1976. Respondents, on the contrary, argue that it was only the temporary moratorium on conversions which expired on that date.

(Footnote continued from previous page)

tions adopted pursuant to this subchapter or section 1464 of this title, by order or otherwise, a conversion from the mutual to stock form of organization involving or to involve an insured institution, except that this sentence shall not be deemed to limit now or hereafter the authority of the Corporation to approve conversions in supervisory cases. The Corporation may by rule, regulation, or otherwise and under such civil penalties (which may be cumulative to any other remedies) as it may prescribe take whatever action it deems necessary or appropriate to implement or enforce this subsection.

(2) The number of applications for conversion which the Corporation may approve pursuant to such regulations prior to such date shall be determined by the Corporation but shall not in any case be in excess of 1 per centum of the total number of all insured institutions in existence on the date of enactment, exclusive of the number of applications submitted for filing prior to May 22, 1973. * * *

(3) Notwithstanding any other provision of law, an insured institution converting in accordance with this subsection may retain its Federal charter. * * *

(4) Any aggrieved person may obtain review of a final action of the Federal Home Loan Bank Board or the Corporation which approves, with or without conditions, or disapproves a plan of conversion pursuant to this subsection only by complying with the provisions of subsection (k) of section 1730a of this title within the time limit and in the manner therein prescribed. * * *

(5) The Corporation shall, at least annually and more often as circumstances require, render reports to the Congress on the exercise of its authority under this subsection.

—I—

The principal issue requires that we construe §402(j) of the NHA, since the FHLBB's authority to approve conversions from mutual to stock organizations depends upon whether 402(j) expired in its entirety on June 30, 1976, or only the temporary limitation on conversions terminated. If the entire section lapsed on June 30, 1976, as petitioner contends, the FHLBB had no authority to approve the conversion. If, however, 402(j) remains in effect, the Bank Board is empowered to authorize savings and loans to convert while retaining their federal charters.[5]

A reading of the statute indicates that, except for the moratorium on conversions, the provisions of Section 402(j) are designed to be permanent. The statute provides that "until June 30, 1976, the [Board] shall not approve [additional conversions]," and this phraseology, by its terms, restricts only the number of conversions the FHLBB could approve during the period prior to June 30, 1976. After that date, it would appear that the Bank Board is authorized to grant conversions, subject only to the remaining provisions of Section 402(j) and the applicable regulations.

Any ambiguity in the statute is resolved by the legislative history of §402(j). The section is a combination of Public Laws 93-100 and 93-495 and the history of both statutes demonstrates that only the moratorium was meant to be temporary. Public Law 93-100 was to provide for a "temporary prohibition" on FHLBB approved conversions. S. Rep. No. 93-149; *reprinted in* [1973] U. S. Code Cong. & Admin. News 2014, 2016. This temporary prohibition was designed to give the Bank Board time to formulate new regulations for the approval of conversions. *Id.*, at 2017. The legislative history of Public Law 93-495, which

[5] Under 12 U.S.C. §1464(i) a federally chartered mutual savings and loan association can convert, with Bank Board approval, to a state stock association. This Conversion would require the association to forfeit its federal charter.

extended the moratorium an additional two years until June 30, 1976, is also instructive as to the congressional intent to temporarily limit the Bank Board's power to grant conversions, except for a series of test cases to be studied by the Board and Congress. The Senate Report on this most recent amendment indicates that only "[t]he moratorium on conversions * * * is continued for 2 years until June 30, 1976." S. Rep. No. 93-902; *reprinted in* [1974] U. S. Code Cong. & Admin. News 6119, 6121. The sole permissible inference from this statement is that Congress recognized that only the limitation on the Bank Board's authority would lapse, not the authority itself.

Furthermore, since June 30, 1976, the FHLBB has approved thirty-seven additional conversions from mutual to stock organizations. Congress has been apprised of these approvals in the FHLBB's yearly reports to the House and Senate Banking Committees.[6] We agree with the respondents that by declining to act despite the Bank Board's known policy of continuing conversions, Congress has tacitly approved the FHLBB's action. As the Supreme Court reasoned in *Ford Motor Credit Co.* v. *Milhollin*, 48 U.S.L.W. 4145, 4148 (February 20, 1980), "(L)egislative silence * * * may * * * betoken permission or, perhaps, considered abstention from regulation." While congressional inaction alone is not controlling, it is certainly persuasive.

Moreover, we are cognizant of the "considerable respect" which is to be accorded an agency's construction of the statute it is authorized to enforce. *Ford Motor Credit Co.* v. *Milhollin*, *supra*, 48 U.S.L.W. at 4148. As the Court explained in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965):

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[6] In a report to the Senate Banking Committee issued on July 8, 1977, the Comptroller General of the United States stated that the FHLBB's power to approve conversions lapsed on June 30, 1976. Petitioner places great reliance on this opinion; however, the Comptroller General serves merely as a Congressional fact finder and his opinions have no independent legal significance. It is noteworthy that Congress received this opinion three years ago and has taken no action to implement its findings.

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' (Citations omitted.)

This deference to agency interpretations is especially appropriate here where Congress has stated that the FHLBB should be given broad "flexibility" in implementing and construing §402(j). S. Rep. No. 93-902; *reprinted in* [1974] U. S. Code Cong. & Admin. News 6119, 6122.

The plain language of the statute, the legislative history and the agency interpretation convinces us that the FHLBB's authority to approve conversions from mutual to stock organizations did not expire on June 30, 1976. A contrary interpretation of §402(j) would not halt conversions, but would merely compel federally chartered mutuals to convert to state stock associations. This, in our opinion, would weaken the federal system and ignore a stated legislative goal of §402(j).[7]

—II—

Petitioner secondly contends that even if the FHLBB is authorized to grant conversions, approval of First Federal's request was arbitrary and capricious. Petitioner argues that the proposed conversion would deprive First Federal depositors of their property rights in the association while providing windfalls to those purchasing conversion stock in the savings and loan. We are of

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[7] Preventing the erosion of the federal savings and loan system was a major purpose behind the passage of §407(j). S. Rep. No. 93-149; *reprinted in* [1973] U. S. Code Cong. & Admin. News 2014, 2017. By allowing federal mutuals to convert to federal stock associations the statute obviates the need to convert to state chartered associations.

the opinion, however, that approval of First Federal's conversion was well within the broad discretion of the FHLBB.[8]

Although the depositors are the legal "owners" of a mutual savings and loan association. their interest is essentially that of creditors of the association and only secondarily as equity owners. Depositors' rights are circumscribed by statute and regulation. They are not allowed to realize or share in profits of the association, but are entitled only to an established rate of interest. The depositors do not share in the risk of loss since their deposits are federally insured, and their only opportunity to realize a gain of any kind would be in the event the savings and loan association dissolved or liquidated. As to this remote possibility the Supreme Court stated:

> If a depositor withdraws from the bank, he receives only his deposits and interest. If he continues, his only chance of getting anything more would be in the unlikely event of a solvent liquidation, a possibility that hardly rises to the level of an expectancy. It stretches the imagination very far to attribute any real value to such a remote contingency, and when coupled with the fact that it represents nothing which the depositor can readily transfer, any theoretical value reduces almost to the vanishing point. (Citations omitted.)

Society for Savings v. *Bowers,* 349 U.S. 143, 150 (1955). In fact, federal regulations prohibit savings and loans from dissolving without Bank Board approval,[9] and no solvent association has ever secured approval for dissolution. Thus, it is apparent that depositors will not be deprived of property rights by conversion

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[8] Although we find petitioner's charge that the Bank Board abused its discretion to be without merit, we suggest, in any event, the proper forum for addressing these contentions is the Congress. Petitioner's objections are not peculiar to First Federal's conversions, but are aimed at the inherent nature of conversions of any kind. As such, these policy arguments are more suitably addressed to a legislative body.

[9] 12 C.F.R. §546.4.

to a federal stock organization. Depositors' only actual rights, their rights as creditors of the association, will remain unchanged by the conversion.[10]

Petitioner finally submits that First Federal's conversion will result in a windfall for those purchasing stock in the association. Petitioner is under the mistaken belief that by purchasing stock in the converted association, the shareholder is buying the existing net worth of the savings and loan. The shareholders, however, do not acquire a right to dispose of the association's net worth, but only purchase the right to participate in future earnings of the savings and loan. Depositors still retain absolute control over their accounts in the association. These funds are not purchased by the new stockholders and remain with the association only for so long as the depositors wish.

We conclude that the approval of First Federal's conversion was within the discretion of the Bank Board, and was neither arbitrary nor capricious. Accordingly, the determination of the Federal Home Loan Bank Board is affirmed.

AFFIRMED.

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[10] Under Bank Board regulations depositors in the savings and loan also have the right of first refusal to purchase stock equal to their percentage of ownership in the mutual association.